



MEMORANDUM

April 14, 2020

To: Tribal Clients
From: Hobbs, Straus, Dean & Walker, LLP /s/
Re: *COVID-19 Economic Response Update*

Congress and the Administration continue to work on COVID-19 economic relief efforts. This memorandum reports on:

- Department of Treasury (Treasury) and Small Business Administration (SBA) Hold Joint Consultation on Paycheck Protection Program;
- Treasury and Internal Revenue Service (IRS) Hold Consultation on Employee Retention Tax Credit and Tax Deferral Provisions of Coronavirus Aid, Relief, and Economic Security (CARES) Act.

This memorandum is current as of the afternoon of April 14, 2020; federal guidance or positions may change.

Treasury and SBA Hold Joint Consultation on Paycheck Protection Program

The Department of Treasury, along with the IRS and the SBA held an hour-long tribal consultation on the Paycheck Protection Program (PPP), as authorized by the CARES Act. Mike Faulkender, the Assistant Secretary for Economic Policy at Treasury, led the consultation; Shawn Pensoneau, Assistant Administrator for the Office of Native American Affairs at the SBA was the point of contact for that agency.

SBA acknowledged that it had received communications from tribes regarding the PPP, but did not expand on its position regarding what entities are eligible to apply for it. Tribes repeatedly urged SBA to consider that tribal business entities generate tribal revenues for tribal services, and that business operations are critical components of the tribal government such that they should qualify under the CARES Act for the SBA PPP. Tribes also said that Congress was clear that all businesses owned or operated by a tribe—including gaming and lending—are eligible for the SBA PPP, and that SBA's rules were unacceptable barriers to certain tribal businesses' participation in the SBA PPP. Multiple tribal leaders spoke directly about small gaming operations, emphasizing that they are critical sources of government funds for tribal services, and are large employers in rural areas and small communities. Tribes also made the point that because they closed their gaming entities early out of concern for customers and public health while states did so much later or not at all, tribes are harder hit economically. Others

reiterated that the program funds were not used to support gaming, but employees themselves. SBA received those concerns, but did not respond substantively.

Tribes also urged SBA to make clear for lenders that the “affiliation rules” do not apply to tribes and their entities, and relayed stories of confusion at the lender level as some banks were treating separate tribal entities as “affiliated” and thus ineligible for the SBA PPP program. SBA’s regulations exempt tribal business concerns from affiliation rules, but the issue has not been clarified despite SBA’s voluminous guidance on this specific program.

Tribes also discussed mechanical concerns, such as seeking clarification that tribal entities may be considered small businesses that operate as separate entities even if they use the tribal Employee Identification Number (EIN). SBA’s limited questions appeared to be aimed at understanding how entities were organized in Indian Country, such as whether tribes use separate legal corporations for small businesses, and whether tribal entities use separate EINs or not. Tribes made the point that tribes with entities that are not strictly “separated” or “segmented” should not be disadvantaged.

One tribe asked about whether they could include tribal administration employees in the relief under the program, arguing that the employees are “governmental,” but also play critical roles in the business aspects of tribal entities. The tribal leader urged SBA to be as flexible as possible, but SBA did not answer or provide its position.

During the call, a new draft of SBA’s “expanded eligibility rules” was circulated via email. In short, that rule proposes to relax the restriction on gaming entities to allow entities that receive less than 50 percent of revenue from gaming and provided gaming revenue is less than \$1 million in 2019. One tribal commenter asked if that included a response to tribal concerns. The response was that the new draft “responded to concerns SBA has received from all sectors.” The issue was not pressed any further by commenters, however. It is clear, however, that the draft rule, if adopted, would not address tribal concerns, as it does not remove the requirement that entities that receive most of their revenue from gaming, even if tribal, are barred from eligibility.¹

¹ The relevant language in the draft rule is found on page 15 of the attachment. It reads as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) the business’s legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business’s total revenue in 2019. Businesses that received illegal gaming revenue are categorically ineligible. The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim of making the PPP Loan available to a broad segment of U.S. businesses and their employees.

Treasury and IRS Hold Consultation on Employer Retention Tax Credits and Employment Tax Deferral Provisions of CARES Act

The Department of Treasury and the Internal Revenue Service also held a tribal consultation on the Employee Retention Tax Credit (ERTC) and the employment tax deferral provisions provided in Sections 2301 and 2302 of the CARES Act, respectively. The ERTC enables an eligible employer to take up to \$5,000 in credits per employee from the employer share of certain payroll taxes for 2020 if the business is shutdown or otherwise realizes losses. There is no guidance, but the statute suggests tribes are eligible for the credit, but perhaps only employees in a non-governmental “trade or business.” The deferral provision enables an employer to defer paying its portion of payroll taxes in 2020, enabling a delay of half of those until the end of 2021 and the other half until 2022.

Krishna Vallabhaneni, Tax Legislative Counsel at Treasury and the Designated Tribal Official for Treasury’s Tribal Technical Advisory Committee led the consultation, standing in for Mike Faulkender. Tribes asked how to remain eligible for this program, and asked if they would face the same restrictions as small business programs – with restrictions on tribal gaming or lending and size. IRS clarified that this program would have no size restrictions, but that there are some considerations about how to calculate the credit based on size (the calculation is different for employers with 100 or fewer workers and those with more than 100 employees). Many tribal commenters raised the concerns that SBA restrictions would apply to this program. IRS sought to ease those concerns and said those restrictions do not apply.

The IRS confirmed that tribal entities are “not per se excluded from the [ERTC], program, but must meet the criteria for the program by operating a trade or business.” The example IRS used was that a “police officer” is not a trade or business employee, and would not qualify for this program. This clarifies that the IRS does not consider the tribe to be totally barred as state and local government entities are. The IRS stated outright that a trade or business operated by the tribal government itself is eligible for the ERTC.

IRS received many questions about the definition of “trade or business,” such as whether tribal health services, tribal work on energy projects (including cultural resources work), tribal timber, tribal housing, and other “quasi-governmental” programs qualified under that definition. Tribes also made the point that tribal staff in those industries or “governmental” positions (such as those handling environmental approvals or cultural resource surveys) are often engaged with business ventures or development that 1) don’t face that governmental restriction; and 2) that those staff critical to tribal industry and non-tribal industry’s abilities to complete projects.

With regard to health services, the IRS asked questions about EINs and if health agencies are “independent” of the tribe. The IRS said that ERTC credits could go to tax-

exempt organizations (or organizations that may be considered tax-exempt). The IRS said it would do more thinking about “where a trade or business starts and stops.” The IRS acknowledged that the EIN question was an important one, because it “usually” considers employers with one EIN as one entity, and said that it would look closely at how this may be different in the tribal context. It appeared that the IRS was not opposed to considering EINs differently for tribes.

IRS requested comment on the “aggregation rules” and how those would apply to tribes and tribal entities. However, it received no comments on this. Those rules are complex regarding controlling or related corporate entities, such a parent-child or sibling corporations that share common control. Tribes did make the point, as above, that simply working for the same employer should not determine applicability of these credits, as tribes do have business functions, and also that many tribal government employees work to support those business functions.

One tribe asked technical questions about whether the businesses needed to be closed and/or whether there needed to be losses in gross receipts or a decline in business to qualify. IRS stated that either a closure due to government order OR a decline in receipts/business would trigger eligibility for the credits. The tribe also asked about the timing of these closures. IRS clarified that retention credits apply to wages paid after March 12. The IRS is asking all employers to report credits for the 1st Quarter of 2020 in their 2nd Quarter Form 941 (not on the 1st Quarter form due at the end of April).

A tribe asked how this credit would work for a tribal business if it currently does not qualify for the SBA PPP, but will in the future. The IRS said that mere “eligibility” for the SBA loans does not disqualify a tribal entity from taking the ERTC, but that a tribe would need to receive the loan to be disqualified. The IRS clarified that if an employer received a small business loan under the SBA PPP or other small business protection loan, they could not also access this program. The IRS stated that if a tribe receives a SBA PPP loan later on this year, that would mean it would not be eligible for ERTC credits taken earlier in the year.

Another tribe asked how to apply the tax credits in concert with the payroll tax deferral provisions under Sec. 2302 of CARES. The IRS did not have a direct answer to these questions. IRS said that it had just posted guidance on deposit deferral rules for Sec. 2302’s deferral provisions. In short, the IRS said that an employer can defer both deposit and payment portions of social security tax payments separate and apart from application of the ERTC credits. The IRS’s FAQ on the deferral program is at <https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020>.

This afternoon IRS published some FAQs about the ERTC program, which are available at: <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the->

cares-act. IRS said it would be posting more in the coming days. The IRS also said that there are forms to receive an advance on the ERTC, but that employers should reduce their payments as much as possible before filing for those advances with Form 7200.

Conclusion

Please do not hesitate to contact us if you have any questions or if you need any additional information or assistance.